

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION,	)	
600 Pennsylvania Avenue, N.W.	)	
Washington, DC 20580	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 09-1000-CKK
	)	
CSL LIMITED,	)	
45 Poplar Road, Parkville	)	
Victoria 3052 Australia	)	
	)	
- and -	)	
	)	
CERBERUS-PLASMA HOLDINGS, LLC,	)	
299 Park Avenue, 22nd Floor	)	
New York, New York 10171	)	
	)	
	)	
Defendants.	)	

**NOTICE OF FILING A JOINT DISCOVERY PLAN**

Pursuant to the Court's Scheduling and Procedures Order, dated June 1, 2009, attached is a notice setting forth the parties' Joint Discovery Plan.

Dated: June 3, 2009

Respectfully submitted,



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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION,  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Plaintiff,

v.

CSL LIMITED  
45 Poplar Road, Parkville  
Victoria 3052 Australia

- and -

CERBERUS-PLASMA HOLDINGS, LLC  
299 Park Avenue, 22<sup>nd</sup> Floor  
New York, New York 10171

Defendants.

Case No.: 09-cv-1000-CKK

**STIPULATED JOINT PROPOSED DISCOVERY PLAN ORDER**

Pursuant to the Court's June 1, 2009 order, the Status Conference on May 29, 2009, and Rule 16, Fed. R. Civ. P., plaintiff Federal Trade Commission ("FTC") and defendants CSL Limited ("CSL") and Cerberus-Plasma Holdings, LLC ("Cerberus"), hereby submit the following proposed Case Management Order.

**Stipulated Discovery Plan**

The parties have agreed to the following provisions, subject to the Court's approval:

1. Commencement: Discovery shall commence on Wednesday, June 3, 2009.
2. Interrogatories: FTC shall be permitted to serve a total of 25 interrogatories on each defendant. Each defendant may serve 25 interrogatories on the FTC.
3. Requests for Admissions: FTC shall be permitted to serve unlimited requests for

admission on defendants and defendants shall be permitted to serve unlimited requests for admission on the FTC.

4. Documents: FTC shall be permitted to serve unlimited requests for documents on defendants and defendants shall be permitted to serve unlimited requests for documents on the FTC.
  - a. Without waiver, the parties agree to suspend the obligation under Rule 26(b)(5)(A), Fed. R. Civ. P., to produce a log of privileged materials withheld from discovery, including documents responsive to discovery in FTC File No. 081-0255 at this time. The parties shall maintain all documents responsive to a discovery request that are withheld pursuant to a claim of privilege or protection.
  - b. All documents produced by a defendant either in response to document requests in this litigation or in the course of the pre-complaint investigation in FTC File No. 081-0255 that were written or prepared by or for a party are presumed to be authentic. The producing party may challenge the authenticity of a document written or prepared by or for that party for good cause shown.
5. Time to Respond to Discovery Requests: Each party shall have 10 days from the date of service to respond to interrogatories, requests for admissions, and requests for documents.
6. Exchange of Fact and Expert Witness Lists:
  - a. The parties shall exchange preliminary party and third party fact and expert witness lists no later than June 5, 2009, with a summary of the topics of their testimony. This list shall be inclusive of testimony that may be offered in live or written format. Exchange of preliminary witness lists shall satisfy the parties'

obligations under Rule 26(a)(1)(A)(i).

- b. Final party and third party fact and expert witness lists, including a list of all rebuttal experts and a summary of the topics of each witness' testimony, shall be exchanged on July 1, 2009, subject to fact discovery closing on July 15, 2009. The parties have not reached agreement as to the date for exchanging final witness lists in the event that fact discovery closes on a date other than July 15, 2009.
- c. Following the exchange of final witness lists, additional fact or expert witnesses may be added only by agreement of the parties or with leave of the Court for good cause shown.

7. Depositions:

- a. Absent a showing of good cause, no party may take more than 30 depositions total (in the preliminary injunction proceeding and the FTC Part III proceeding) prior to the close of discovery in the preliminary injunction proceeding.
- b. Depositions taken in the administrative litigation may be used in the preliminary injunction proceeding, unless such depositions are conducted after the close of discovery in the preliminary injunction proceeding.
- c. Depositions taken in this proceeding may be used in the FTC Part III proceeding.
- d. A witness that has provided a deposition in this proceeding shall not be required to also provide a deposition pursuant to the Part III proceeding.
- e. A deposition taken in the FTC Part III proceeding shall not be retaken in the preliminary injunction proceeding absent a showing of good cause.
- f. The fact that the FTC has conducted an investigational hearing of an employee of

Defendants or a third party during its pre-complaint investigation does not preclude the FTC from deposing the employee in this proceeding.

- g. A party need not separately notice the deposition of a third party noticed by an opposing party.
  - h. Once a party schedules a deposition with a third party, it shall notify the other party of the time and place for the deposition within one hour of scheduling the deposition. A third party deposition shall not be scheduled without providing 48 hours advance notice of the date of the deposition to the named parties in this matter, provided however, that:
    - i. The 48 hour provision shall not apply during the last two weeks of fact discovery. During such time, the parties shall provide notice that is reasonable under the circumstances.
  - i. For party depositions, 7 calendar days notice to the defendants will be considered presumptively reasonable, provided however, that:
    - i. The 7 calendar day provision shall not apply during the last two weeks of fact discovery. During such time, 3 calendar days notice will be considered presumptively reasonable.
  - j. Depositions taken in the FTC Part III proceedings that either party seeks to rely on in the preliminary injunction proceeding shall be limited to seven hours.
8. Discovery conducted in the Administrative Proceeding: Discovery conducted in the administrative proceeding that is obtained after the close of discovery in the preliminary injunction proceeding may not be used in the preliminary injunction proceeding.
- a. All discovery conducted in the administrative proceeding prior to close of

discovery in the preliminary injunction proceeding may be used in the preliminary injunction proceeding, subject to the limitations of Paragraphs 2 and 7 above.

9. Third Party Declarations and letters: All letters or declarations relating to the proposed acquisition that are currently in the possession of the parties shall be exchanged on June 3, 2009, as outlined above. Subsequent letters or declarations received by either party shall be turned over to the other party within one day of being signed.



**Stipulated Schedule**

Exchange of Letters, Declarations, 3 <sup>rd</sup> Party responses to FTC subpoenas, FTC investigational hearings of 3 <sup>rd</sup> Parties	<b>June 3, 2009</b>
Exchange of Preliminary Fact and Expert Witness Lists	<b>June 5, 2009</b>
Exchange of Final Fact and Expert Witness Lists	<b>July 1, 2009*</b>
Expert Reports and Depositions	Not Agreed
Discovery in this matter shall close on:	<b>July 15, 2009</b>
FTC files a final Motion for Preliminary Injunction	<b>July 31, 2009</b>
Defendants file final Opposition to Motion for Preliminary Injunction	<b>August 7, 2009</b>
FTC files a Reply to Defendants' Opposition	<b>August 14, 2009</b>

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\* Subject to fact discovery closing on July 15, 2009.

### **Areas of Disagreement Between the Parties**

The parties have been unable to resolve or further narrow the following areas of disagreement:

1. **Final Date for Exchanging Fact Declarations:**

- a. FTC's proposal: All fact declarations that will be submitted to the Court or relied upon by either party must be exchanged two weeks prior to the close of fact discovery.
- b. Justification for FTC's proposal:

The FTC proposes a cutoff for the exchange of declarations submitted by third parties and party employees/representatives to ensure that they can be tested by deposition prior to the close of fact discovery. Because this is a preliminary injunction proceeding, with the full administrative trial on the merits scheduled to commence in October, depositions are the most efficient means to ensure that the Court benefits from the testing of this important testimony.

Defendants suggest that they cannot reasonably assemble and turn over third-party fact declarations until after fact discovery closes because their opportunity to gather evidence from third parties is just now beginning. This is not the case. Defendants were aware of this proposed acquisition long before the FTC. Thus, for the entire time period of the FTC's investigation, and indeed for some time before that, Defendants had the opportunity to approach third parties and seek letters or declarations that would support Defendants' claims. And these third parties – hospitals, distributors, GPOs – are entities with whom Defendants have longstanding, preexisting relationships. To claim that the FTC had a “head start” with third parties simply is not accurate. This fact is borne out in prior Section 13(b) cases, in which merging companies have gathered dozens of third-party declarations in support of a proposed merger long before a complaint was filed. Defendants were obviously aware of this opportunity, as they in fact



obtained several letters from third parties more than two months ago.

A cutoff for exchange of party declarations is likewise necessary to ensure testing of this testimony through depositions. We believe that it is in the Court's interest to evaluate written testimony after it has been tested by the discovery tool of deposition. As Defendants are well aware of their executives' views regarding the proposed acquisition and they will likely be readily available to counsel for the purpose of drafting declarations, requiring them to submit such declarations two weeks prior to the close of discovery would not be unfair or unduly burdensome.

c. Defendants' proposal: FTC shall submit all fact declarations with its final Motion for Preliminary Injunction. Defendants shall submit all fact declarations with their final Opposition.

d. Justification for defendants' proposal:

Defendants' proposal takes into account the parties' agreement to exchange on June 5, 2009 their preliminary list of fact witnesses who will provide either live or written testimony, and that the parties will exchange final witness lists on July 1, 2009. Under this plan, the FTC would have advance notice of the witnesses on which Defendants intend to rely and the topics their testimony will cover. Thus, the FTC will have every opportunity to take informed depositions of these proposed fact witnesses. Defendants' proposal is particularly reasonable given that the FTC has already used its subpoena power over the course of its eight month investigation to obtain testimony and declarations from third parties and to obtain testimony from the Defendants' executives. The FTC has already produced 21 declarations from witnesses associated with a wide range of industry participants, including competitors, potential entrants, distributors, customers, patient groups and physicians. By contrast, Defendants will only have six weeks to conduct all discovery necessary to rebut the FTC's claims. Under the FTC's

proposal, Defendants would be forced to obtain any third party declarations to respond to the FTC's already extensive discovery in less than one month.

2. **Expert Reports and Expert Depositions:**

a. **FTC's proposal:**

FTC Expert Reports due	July 3, 2009
Defendant Expert Reports Due	July 8, 2009
FTC Rebuttal Reports Due	July 13, 2009
Expert Depositions	July 14-15, 2009
Close of all discovery	July 15, 2009

b. **Justification for FTC's proposal:**

Because the Court's Scheduling Order clearly states that discovery is closed on July 15, Scheduling and Procedures Order at 5, June 1, 2009, the FTC proposes a staggered schedule for expert discovery, starting on July 3. In contrast, Defendants take the position that expert discovery should not even begin until after July 15, and would not be completed until July 27, four days before the FTC's final Motion for Preliminary Injunction is due. The Court's Order – issued after both sides had an opportunity to present their positions on discovery to the Court – makes clear that discovery ends on July 15. During the May 29 teleconference with the Court, the subject of expert report dates was explicitly mentioned in the context of the "outside discovery date." Tr. of Telephonic Hr'g, 26-28, May 29, 2009. The FTC's proposed expert discovery schedule complies with the requirements of the Court's Order. Recognizing the Court's admonition that requests for extensions are extremely discouraged, the FTC does not believe that, at this time, circumstances justify extending expert discovery beyond the cut-off

date. Furthermore, to the extent Defendants now wish to change the date for close of discovery, the FTC believes that a motion for extension is a more appropriate means of addressing this concern than the joint discovery plan, which is intended to implement, rather than change, the Court's order.

The FTC recognizes that, instead of a staggered exchange of expert reports, Defendants propose a mutual exchange of experts reports, followed by depositions, and then a mutual exchange of rebuttal reports. Although the FTC's preference is for a staggered exchange, the FTC is not opposed to adopting Defendants' approach to expert discovery, as long as the discovery is completed on or before the close of discovery on July 15. Hence, the FTC would agree to the exchange of expert reports on July 3, expert depositions on July 9 and 10, and the exchange of rebuttal reports on July 15. The FTC also recognizes Defendants' concerns that expert reports not be exchanged until after the close of fact discovery, thereby permitting the experts full access to all information developed in discovery. To accommodate Defendants, the FTC would be prepared to have fact discovery close on July 2 with expert discovery continuing through July 15. Even if the Court moved up the close of fact discovery in this fashion, the duration of fact discovery – 4 weeks – would still be comparable to the four and a half weeks of fact discovery in *FTC v. Whole Foods* and *FTC v. CCC*, the last two Section 13(b) preliminary injunction proceedings in the district court of the District of Columbia.

c. Defendants' proposal:

Parties simultaneously exchange Expert Reports	July 17, 2009
Expert Depositions	July 21-23, 2009
Parties simultaneously exchange Rebuttal Reports	July 27, 2009

d. Justification for defendants' proposal:

Defendants' propose simultaneous exchanges of initial expert reports and rebuttals in order to allow both sides the opportunity to offer rebuttal reports, rather than affording only the FTC's experts the ability to offer rebuttals. Defendants intend to immediately file a motion to extend the discovery deadline to July 27, 2009 in order to accommodate expert report exchange and depositions after the July 15, 2009 discovery deadline in the current scheduling order. The experts should have the benefit of, and sufficient time to consider the full factual record before they finalize their opinions and reports. Given the expected volume of both testimonial and document discovery, it would be unreasonable to expect the experts to have fully analyzed the discovery record by the close of fact discovery. Under Defendants' request to extend the discovery deadline, July 15, 2009 would become the cut-off for all fact discovery, and expert discovery would occur prior to the July 31, 2009 deadline for the FTC's supplemental memorandum in support of its motion for a preliminary injunction. Importantly, Defendants' request to extend the discovery deadline to accommodate expert discovery would not affect the ultimate briefing deadline of August 14, 2009. The FTC has had the benefit of discovery obtained during the course of its eight month investigation and should not require a substantial time between the close of expert discovery and the filing of its supplemental memorandum on



July 31, 2009. Furthermore, the FTC has offered no reason, apart from the current scheduling order, as to why the expert discovery schedule proposed by Defendants is objectionable.

3. **Allocation of Time for Third-Party Depositions:**

- a. **FTC's proposal:** The time for each third-party deposition shall be allocated evenly between the FTC (3.5 hours) and the defendants (3.5 hours).
- b. **Justification for FTC's proposal:**

This preliminary injunction proceeding presents the first opportunity for any party to conduct a Federal Rules deposition of any third party. Depositions present an important opportunity for the parties to obtain evidence to present to the Court for its consideration. As such, it is imperative that the FTC and Defendants have the same opportunity to develop deposition evidence. Defendants assert that they should control five hours of the seven hour deposition of any witness who submitted a declaration to the FTC or of whom the FTC conducted an investigational hearing. Unlike Defendants' party witnesses, with whom they have unlimited access, the FTC's third party witnesses are independent persons. The fact that a third party submitted a declaration that supports the FTC's case does not mean that they should no longer be considered third parties for purposes of this proceeding. More importantly, the FTC should not be denied a reasonable opportunity to develop evidence from third parties to respond to the arguments Defendants make in their June 12 opposition to the FTC's initial Motion for Preliminary Injunction.

Thus, it is the FTC's position that deposition time should be split evenly. Defendants have had, and continue to have, as much right to contact the FTC's third-party declarants as the FTC does. Furthermore, because the FTC has provided Defendants with all declarations

received to date, Defendants already have access to the facts and opinions that these third parties have shared with the FTC – a considerable advantage. Likewise, the FTC believes that third-party witnesses who have provided Defendants with letters supporting the merger should also continue to be treated as independent third parties, with deposition time split evenly between Plaintiff and Defendants.

- c. Defendants' proposal: If the FTC has previously conducted an investigational hearing or obtained a declaration from a third party witness, the time for that witness' deposition shall be allocated as five hours for the defendants and two hours for the FTC. If the defendants have previously obtained a letter or declaration from a third party, the time for that witnesses' deposition shall be allocated as five hours for the FTC and two hours for the defendants. In all other cases, the time for each third-party deposition shall be allocated evenly between the FTC (3.5 hours) and the defendants (3.5 hours).

- d. Justification for defendants' proposal:

As noted above, the FTC has had the opportunity to take substantial discovery during the course of its investigation. Defendants were not permitted to participate in any third party hearings and will be limited to the following six weeks to take all third party discovery necessary to rebut the FTC's claims. With respect to third parties from whom the FTC has already obtained declarations or testimony, FTC insists on "equal" time with Defendants. But the FTC has already had a first round of testimonial discovery from these witnesses, and demanding the same amount of time now will further tilt the discovery process substantially in the FTC's favor. These depositions will be the first opportunity for Defendants to obtain discovery from such third parties. Having already obtained substantial discovery from these third parties, the FTC should be focused in its questioning and will not require the same amount of time as the two Defendants that do not have the advantage of a prior deposition. Despite the fact that the FTC



had the opportunity to conduct discovery of any third parties during its investigation, with respect to third parties from whom the FTC has not previously received declarations or testimony, Defendants are willing to split deposition time equally. In addition, to the extent Defendants have previously received letters of support from certain third parties, Defendants are willing to give the bulk of deposition time to the FTC.

Respectfully submitted,



Dated: June 3, 2009

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Dated: June 3, 2009

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Dated: June 3, 2009

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ORDERED:

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The Hon. Colleen Kollar-Kotelly  
United States District Judge

Dated: